FILE COPY

Office-Supreme Court
JAN 31 195

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 580

PACIFIC ATLANTIC STEAMSHIP CO.,
Petitioner,

vs.

FLORENCE G. HOLLIDAY, AS ADMINISTRATRIX OF THE ESTATE OF CLINTON HOLLIDAY, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	2
Jurisdiction	3
Opinion below	4
Question presented	4
Reasons relied upon for allowance of the writ	4
Without evidence to suppport it a Court is not free to find that a delay in obtaining medical attention was a legally responsible cause of a death which occurred eighteen days later	7
Conclusion	11

Table of Cases Cited

Baltimore and Carolina Line v. *Redwood*, 295 U.S. 264	6, 11
Bauer v. *Clark*, 161 F. 2nd 397, 332 U.S. 889	6
Brady v. *Southern Railway Company*, 320 U.S. 476	6, 9, 11
Commercial Molasses Corporation v. *New York Tank Barge Corporation*, 314 U.S. 104	8, 11
Cortes v. *Baltimore Insular Line, Incorporated*, 287 U.S. 367	5
De Zon v. *American President Lines*, 318 U.S. 660	6, 11
District of Columbia v. *Vignau*, 144 F. 2nd 641, 323 U.S. 781	11
Echenrode v. *Pennsylvania Railroad Company*, 335 U.S. 329	11
Galloway v. *United States*, 319 U.S. 372	9
Henry Cross Company v. *Simmons*, 96 F. 2nd 482	11
Holliday, etc. v. *Pacific Atlantic Steamship Company*, 99 F. Supp. 173, 197 F. 2nd 610	4
Iroquois, The, 194 U.S. 240	6
Lilienthals Tobacco v. *United States*, 97 U.S. 237	9

Page

Pennsylvania Railroad Company v. *Chamberlain*, 288 U.S. 333 11
Spain v. *Powell*, 90 F. 2nd 580 11
Western and Atlantic Railroad v. *Hughes*, 278 U.S. 496 9

STATUTES AND OTHER AUTHORITIES CITED

Federal Employers' Liability Act, (United States Code Annotated, Title 45, Section 90) 5
Jones Act, (United States Code Annotated, Title 46, Section 688) 5

United States Code Annotated:

Title 28:

Section 1254(1) 3
Section 2101(c) 3

Title 45, Section 90 5
Title 46, Section 688 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 580

PACIFIC ATLANTIC STEAMSHIP CO.,
Petitioner,

vs.

FLORENCE G. HOLLIDAY, AS ADMINISTRATRIX OF THE ESTATE OF CLINTON HOLLIDAY, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Pacific Atlantic Steamship Co. respectfully prays that a writ of certiorari may issue out of this Court to review the judgment of the United States Court of Appeals for the Third Circuit entered June 27, 1952. By that judgment the Court of Appeals reversed the judgment of the United States District Court for the District of Delaware and remanded the case to the District Court with directions to enter judgment in favor of the respondent and against the petitioner upon the question of liability and to determine the amount of the damages.

Summary Statement of Matter Involved

The present case was instituted as a suit in Admiralty. It sought to recover damages for the alleged wrongful death of one Clinton Holliday who had been the cook employed on board the petitioner's vessel "Peter Kerr".

At the trial the libellant (here respondent) alleged and sought to prove that Holliday had sustained an injury to his foot and ankle during the course of his employment on board the vessel and that infection from that injury caused his death on February 18, 1942.

As the opinion of the District Court indicates (R. 122, 124) the primary charge of negligence against the petitioner had to do with alleged negligent failure to furnish a place of work which was reasonably safe. This issue was decided in favor of the petitioner by the District Court and the Court of Appeals did not disturb that finding.

A subsidiary allegation of negligence against the petitioner at trial was that it had failed to furnish proper and adequate medical attention after the injury. The factual background of this facet of the case can be briefly stated.

Shortly after the injury the vessel called at Port Elizabeth, South Africa. The testimony showed that a doctor who was dead at the time of trial had come aboard, examined Holliday, prescribed treatment for him and indicated that it was safe for him to proceed with the vessel to Capetown. At the time of trial the claim advanced was that the officers of the vessel had been negligent when they did not put Holliday ashore for hospitalization when the ship was at Port Elizabeth. The District Court found that issue in favor of the petitioner and again its finding was not disturbed by the Court of Appeals.

The vessel left Port Elizabeth for Capetown late in the afternoon of February 5th. It arrived in the roadstead off Capetown about 7 P. M. on February 7th. (Opinion

of C.A. p. 5, R. 157.) South Africa was then at war with the Axis powers and the vessel anchored in the roadstead overnight. It docked shortly after 8 o'clock the next morning and the Captain immediately sent for a doctor to attend Holliday. When that doctor arrived on board the vessel shortly after noon of February 8th he ordered Holliday taken ashore to a hospital. He remained there as a patient until his death on February 18th.

The cause of death was cardiac failure, secondary to septicemia, and nephratis (R. 114).

Although it had only the record before it, the Court of Appeals chose to hear the matter *de novo*. It accepted the testimony of the witness Cooper which had been rejected by the trial Judge who had seen and heard Cooper testify. The Court of Appeals rejected the testimony of two ship's officers which had been accepted by the trial Judge. In order to fasten liability upon the petitioner the Court of Appeals held that the delay of approximately 15 hours between the time the vessel arrived in the roadstead off Capetown on February 7th and the time the doctor actually saw and administered to Holliday was negligence. It further "concluded" that the delay was a "legally responsible cause of death".

Jurisdiction

The judgment of the Court of Appeals was entered June 27, 1952. The time within which the petitioner might file a petition for rehearing was enlarged and a petition for rehearing was filed August 11, 1952. On December 31, 1952 an order was entered by Mr. Justice Burton enlarging the time within which this petition could be filed to and including January 31, 1953. The jurisdiction of this Court to entertain this petition, grant the same, and review the judgment of the Cour of Appeals is provided by Title 28, U. S. Code, § 1254(1) and § 2101(c).

Opinion Below

The opinion of Judge Rodney of the United States District Court for the District of Delaware and his findings of fact and conclusions of law appear beginning at p. 121 of the record in this case. The opinion is reported 99 F. Supp. 173.

The opinion of the Court of Appeals, written by Judge Hastie, is reported 197 F. 2(d) 610 (R. 156).

Question Presented

May a Court of Appeals, hearing an Admiralty suit as a trial *de novo,* make its own finding of fact which it incorrectly designates as a conclusion where there is literally no evidence in the record to support it?

Reasons Relied upon for Allowance of the Writ

The question which this Court is asked to review is of immense practical importance in the proper and orderly administration of justice in the Federal Courts. With *equal* justice under law we have no quarrel. We do quarrel with the proposition that a Federal Appellate Court is free to enunciate its own notions of what may represent a socially desirable result in a given set of circumstances without regard to legal principles which time and time again this Court and other Courts have said represent the sine qua non for a judicial determination.

The problem which this case presents occurs daily in the United States Courts. This Court has said that in order to sustain an award in favor of a party upon whom the law casts the burden of proof there must be evidence which must support the conclusion in favor of that party. Here, there is not one jot of evidence and a Court of Appeals has substituted what it is pleased to call its own "proper conclusion" in place of evidence.

The case which the petitioner must here present is devoid of emotional appeal. This is not a "big" case as cases are measured by the amount of the potential verdict. If the importance of cases is to be measured by the importance of the fundamental nature of the legal principle involved then this is a case which is important in the over-all judicial picture. If the Court of Appeals is free to make a finding without evidence to support it when it sits as a Court which hears a case de novo, then any Court, District or Circuit, is free to substitute its own view for the result which would be demanded by the application of what had heretofore been regarded as fundamental principles.

It is upon this basis that we state that the present case is important and that it merits review by this Court.

I

This is an action founded upon the Jones Act, 46 U. S. C. A. 688. It is that Statute which incorporates into the Maritime law of master and servant the principles of the Federal Employers' Liability Act, 45 U. S. C. A. 90, et seq. and makes applicable to seamen the same rights as those enjoyed by employees of railroads engaged in interstate commerce. As she was free to do, respondent chose to institute the action in Admiralty rather than upon the law side of the District Court, as the Jones Act would permit her to do. The action could be maintained at all only by reason of the remedy the Jones Act affords because the unmodified Maritime law gives no right of action to recover damages for death. *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367 @ 371.

It is a fundamental legal principle that the party who seeks to recover because of an alleged default on the part of his adversary must carry the burden of proof. The burden of proof in its primary sense rests upon the party

who asserts the affirmative of an issue.[1] If the party having the burden of proof fails to sustain it or comes forward with proof which with *equal* validity will support either one of two inconsistent inferences, then the verdict must go against the party upon whom the law casts the burden of persuasion. *Baltimore and Carolina Line* v. *Redwood*, 295 U. S. 264; *Brady* v. *So. Ry. Co.*, 320 U. S. 476; *Pa. R. Co.* v. *Chamberlain*, 288 U. S. 333.

Hearing the case *de novo*, the Circuit Court substituted its own findings for those of the District Judge. The evidence showed only that the respondent's vessel had anchored in the roadstead off Capetown at 8:05 P. M. on February 7th. The only evidence in the original record as to why the vessel did not proceed into the Harbor that night was the testimony of the vessel's Second Officer that it was "too late to go in . . ." (R. 255). The Circuit Court held that this delay constituted negligence without any evidence before it as to the reasons why the vessel did not proceed into the Harbor and obtain medical attention for Mr. Holliday that night. In support of its conclusion that there had been negligence, the Court of Appeals cites only one case, *The Iroquois*, 194 U. S. 240. That case stands only for the proposition that the Master of a vessel owes a duty to obtain medical attention for an injured seaman. It does not stand for the proposition that mere failure or delay itself constitutes negligence. There must be evidence to support the Circuit Court's conclusion of negligence, *De Zon* v. *American President Lines*, 318 U. S. 660.

When this petitioner requested the Circuit Court to grant rehearing and assigned among its reasons this "conclusion of negligence", the present respondent obtained affidavits from South Africa which would, if they qualified as evidence, have supported the decision of the Court of Appeals. It is

---

[1] *Bauer* v. *Clark*, 161 F. 2(d) 397, cert. denied, 332 U.S. 889.

important to bear in mind that these were ex parte affidavits and were not in the record when the Court of Appeals reached its conclusion. We submit that they cannot support the holding of the Court of Appeals.

It is a fundamental concept of Anglo-Saxon jurisprudence that ex parte evidence is not admissible. Correctly speaking, the affidavits are not evidence at all. No opportunity was afforded the petitioner to cross-examine the witnesses and apply those tests which have always been considered necessary to afford proper safeguards before evidence is received.

Our statement above that the Court of Appeals reached its conclusion on this point from a record which contained no evidence to support its conclusion is tacitly admitted by the respondent. If there had been evidence to support the conclusion "negligence" of the Court below it would have been unnecessary for the respondent to have obtained the affidavits in South Africa which she filed only in opposition to this petitioner's request for rehearing.

Without Evidence to Support It A Court Is Not Free to Find That a Delay in Obtaining Medical Attention Was a Legally Responsible Cause of a Death Which Occurred 18 Days Later

In this, the principal reason advanced by petitioner, we rely entirely upon those portions of the testimony to which the Court below referred in its opinion. We will use them to demonstrate the completely fallacious result which that Court reached.

Writing for the Court of Appeals, Judge Hastie holds that, in the light of the chronology of events, it is proper to conclude that if Mr. Holliday had been hospitalized and treated on the night of February 7th rather than at noon on February 8th, there was a likelihood that his life might have

been saved. No evidence supports that statement. Mr. Holliday survived in a hospital under proper medical attention for 18 days before he died. The physician who treated him said not a word about any ill effects caused by the delay in treatment. It must be remembered, as the attending doctor testified, that modern treatment by penicillin was not then available. If the decedent was to lose his life in any event it does not establish causal connection or, if you please, "a legally responsible cause of death" to say that he should have been treated earlier. The law cast the burden of proof upon this respondent. The delay may or may not have been a factor in contributing to the death. The infection was already present and it has been judicially determined by two Courts that the original infection was not something for which this petitioner was responsible. The evidence here will support inconsistent inferences. The fact of delay is admitted. The effect of delay is left entirely to speculation and the Court of Appeals chose to ignore fundamental legal concepts and decisions by this Court in order to reach a result which would cast the loss upon the party best able to bear it. That is not justice under law. It is, rather, the perversion of the judicial process.

The law as to burden of proof has been stated many times by this and other Courts.

> "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."[2]

If damages are recoverable "under the Jones Act only for negligence" then the burden of proof rested upon this respondent (libellant below) because the burden of proof in Civil cases lies with the party who asserts the affirmative of

---

[2] *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104 @ 112 and cases there cited.

the issue.[3] This applies to causation as fully as it does to negligence or any other *necessary* element of respondent's case.[4]

Thus the law cast upon the respondent the burden of proving by competent evidence that there was causal connection between the delay in treatment and the death 18 days later. We do not here make the so-called "scintilla" of evidence argument. This Court has said, "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact . . ."[5] In our case the Court of Appeals did not have a scintilla of evidence to support its conclusion of causal connection between the delay and the death. We suggest that if a jury had been the trier of fact in the case at bar, a motion for a directed verdict would have had to be granted in order to conserve judicial time and save the mischance of speculation over a legally unfounded claim.[6]

Mr. Holliday was ill on February 7th when the ship anchored overnight in the roadstead off Capetown. Two Courts have held that this Petitioner is not legally responsible for his condition as it then existed. About noon on February 8th he was treated by a physician who directed that he be hospitalized. The testimony of the attending physician was taken by commission. This doctor testified that Holliday should have been hospitalized in Port Elizabeth three days earlier. Whether that be the correct view or not makes no difference because Holliday was seen and treated by a competent doctor at Port Elizabeth on February 5th. This physician instructed the ship's officers that it was safe for Holliday to proceed with the ship to Cape-

---

[3] *Lilienthals Tobacco* v. *U.S.*, 97 U.S. 237.

[4] *Brady* v. *Southern Ry. Co.*, 320 U.S. 476.

[5] *Brady* v. *Southern Ry. Co.*, 320 U.S. 476 @ 479; *Western & Atlantic R.R.* v. *Hughes*, 278 U.S. 496.

[6] *Galloway* v. *U.S.*, 319 U.S. 372.

town. Up to this point there was no negligence on the part of the ship's officers and both Courts below have so found. If Dr. Shapiro (whose testimony appears at 113 to 121a) had been asked for an opinion upon the effect of delay between 7 P. M. on February 7th and noon on February 8th, there might have been some evidence to support the Circuit Court's conclusion. No such question was asked and there is not a jot of evidence on the point. No one can tell from this record whether the delay of about 15 hours was a "legally responsible cause of death" (p. 6 of C. A. opinion; R. 161) or not. It may have been. It may have played no part. The intervening period of 18 days would certainly indicate that it would be difficult for any professional medical witness to express an opinion on the subject. Certainly there should have been evidence to support what the Court below calls "a proper conclusion". It may or may not be a proper conclusion for a medical witness but the Court below has treated it as a conclusion of law with no evidentiary basis to support it.

The testimony of Dr. Shapiro quoted by the Circuit Court (slip opinion p. 5; R. 159) that there *might* have been a virulent spread of infection during the three-day period from February 5th to February 8th will not support a conclusion that a 15-hour period of delay in treatment actually did cause death. The doctor's opinion that he found it "difficult to believe" that the infection spread so rapidly in three days negates the possibility that the 15-hour delay was vital.

The question of whether the 15-hour delay was crucial or not under the circumstances of this case was a matter concerning which evidence should and could have been produced. No evidence was produced. We simply do not know whether the likelihood of arresting the infection was decreased or not. Holliday did not die until the 18th day

after hospitalization. The tenuous conclusion of the Court below finds no support in the record.

Since the case had to be remanded for the assessment of damages in any event, we suggest that it would have been the proper course to have remanded it so that testimony on the point could have been introduced.

Conclusion

The decision of the Court below cannot be supported from the evidence in this record. In entering judgment against this Petitioner the Court below held contrary to the following decisions by this Court as well as a longer list of decisions by other Courts of Appeal.

Brady v. *Southern Ry. Co.*, 320 U. S. 476
Echenrode v. *Pennsylvania R. Co.*, 335 U. S. 329
DeZon v. *American President Line*, 318 U. S. 660
Commercial Molasses Corp. v. *New York Tank Barge Corp.*, 314 U. S. 104
Pennsylvania R. Co. v. *Chamberlain*, 288 U. S. 333
Baltimore & Carolina Line v. *Redman*, 295 U. S. 654
Henry Cross Co. v. *Simmons*, 96 F. (2) 482
Spain v. *Powell*, 90 F. (2) 580
District of Columbia v. *Vignau*, 144 F. (2) 641; cert. den. 323 U. S. 781

The present case is a classic illustration of the rule that judgment must go against the party who, having the burden of persuasion, fails to introduce evidence to support a finding essential to his recovery.

The decision of the Court below is wrong. It is important that inferior Courts know that the rules of law apply even to a hearing *de novo* before a Court of Appeals. The writ should be granted.

Respectfully submitted,

PACIFIC ATLANTIC STEAMSHIP CO.,
Petitioner.
By: THOMAS E. BYRNE, JR.,
Counsel for Petitioner.

(6261)

FILE COPY

Office - Supreme C
FILED
MAR 20
HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1952.

No. 580.

PACIFIC STEAMSHIP CO.,

Petitioner,

v.

FLORENCE S. HOLLIDAY, as Administratrix of the Estate of Clinton Holliday, Deceased,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

ABRAHAM E. FREEDMAN,
HENRY A. WISE, JR.,
Counsel for Respondent.

Intercontinental, 240 Chestnut St., Phila. 6, Pa.

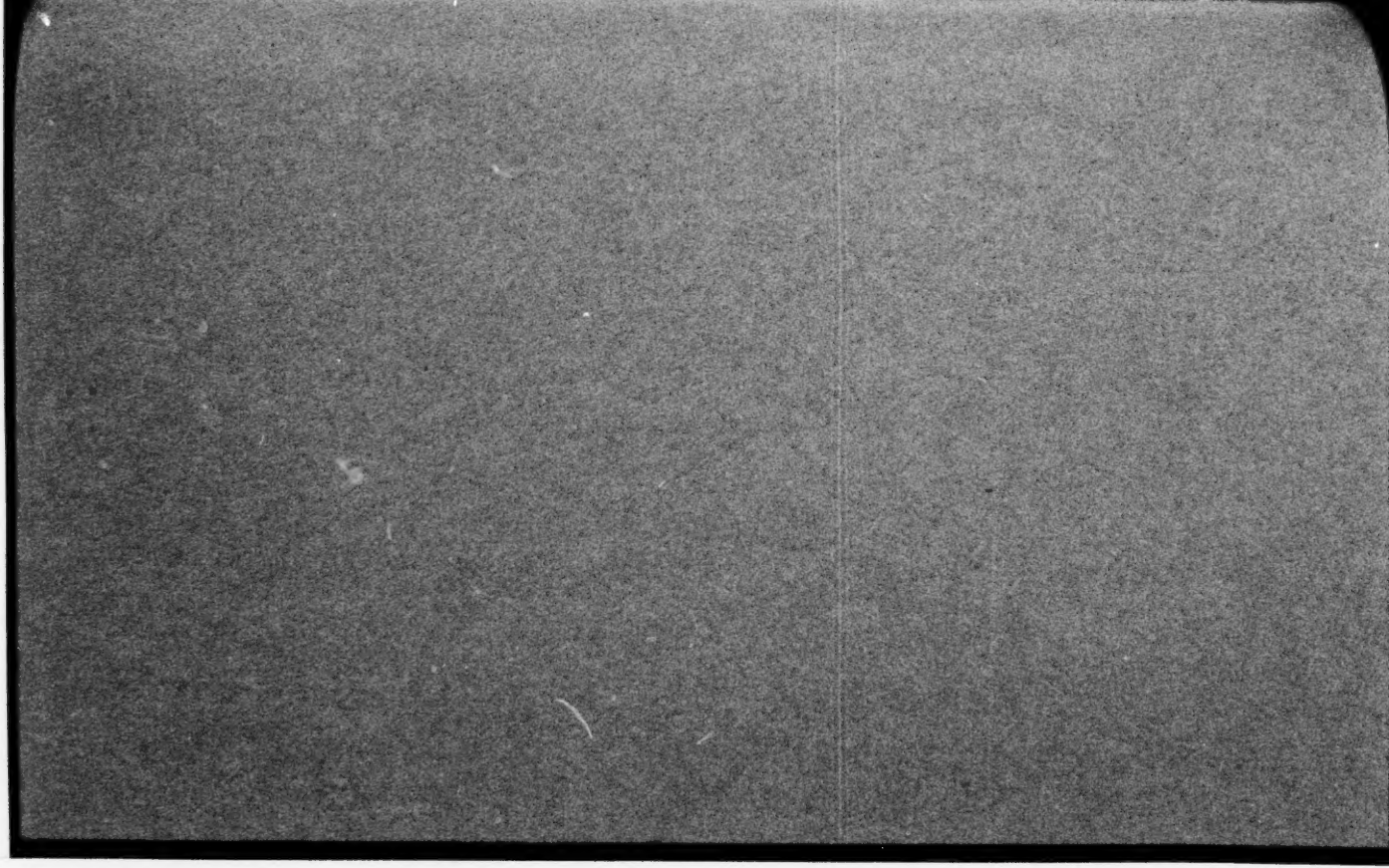

TABLE OF CONTENTS OF BRIEF.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	1
Summary Statement	2
Argument	4
The Record Clearly Sustains the Findings of the Court of Appeals	5
The Ex Parte Affidavits	10
There Is No Important Question of Law Involved.	12
Conclusion	13

TABLE OF CASES CITED.

	Page
Crist v. U. S., 163 F. 2d 145, cert. den. 332 U. S. 852	5
Matson Navigation Company v. Pope and Talbot, Inc., 149 F. 2d 295	5
The S. C. L. No. 9, 114 F. 2d 964	5

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 580.

PACIFIC STEAMSHIP CO.,

Petitioner,

v.

FLORENCE G. HOLLIDAY, AS ADMINISTRATRIX OF THE ESTATE OF CLINTON HOLLIDAY, DECEASED.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court is reported at 99 F. Supp. 173. The opinion of the Court of Appeals for the Third Circuit is reported at 197 F. 2d 610.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED.

Does the record support the fact findings of the Court of Appeals below that petitioner was negligent in failing to provide prompt medical treatment, which failure resulted in the seaman's death.

SUMMARY STATEMENT.

Clinton Holliday was employed on petitioner's vessel, the "Peter Kerr" as a ship's cook for a voyage commencing in November, 1941 from New York to South African ports and return. In the course of that voyage, on February 1, 1942, while the vessel was approaching the harbor of Port Elizabeth in South Africa, Holliday was procuring some meats from the ship's refrigerator when his left ankle was lacerated and punctured by several strands of wire which protruded from a box of provisions on the floor of the refrigerator (R. 34-35). The incident was reported immediately to the Second Mate, and medical attention was requested by the delegate for the steward's department. The Mate made no examination but furnished a lotion to be applied to the injured leg (R. 35). The following morning, as Holliday "turned to" at 6:00 A. M. and continued with his usual duties, he began to experience pain in the leg and he developed a decided limp by the time the vessel arrived in Port Elizabeth about noon on that day. Later on during the day the pain in the leg became so bad that the delegate advised Holliday to lie down and he again reported the condition to the Mate (R. 36). Thereafter, the Captain and the Mate came down to Holliday's quarters and made an examination but did nothing more. By that time the ankle had already become swollen at the site of the wound (R. 39). The vessel lay in Port Elizabeth for three days, during which "the skin rose up like a water blister around the ankle" (R. 43). The vessel left Port Elizabeth on February at 4:23 P. M., bound for Capetown. During this phase of the voyage, an examination of Holliday's leg by the ship's delegate revealed that: "It have a big pus on the side and black-like water in it" (R. 41). The pain became so intense that Holliday was "talking out of his head" and it was thought he was going to jump overboard (R. 43). The vessel arrived in Capetown and dropped anchor in the roadstead on February 7 at 7:18 P. M. but no doctor was

summoned and no arrangements made to obtain medical attention. The following morning, February 8, the vessel was shifted to a pier but no doctor was brought aboard until 12:30 P. M. of that day about seventeen hours after the vessel's arrival in port (see deck log). At that time Holliday's leg was swollen to twice its normal size, and Dr. Shapiro, the physician who had been summoned, found him to be irrational, delirious and suffering from a severe septicemia (R. 114). Pursuant to Dr. Shapiro's instructions, Holliday was removed to a hospital immediately, but the infection had so far progressed that he went steadily downhill and he died ten days later (R. 114).

This lawsuit was instituted on behalf of the widow of the decedent claiming damages upon the ground that: (a) the accident was due to the negligence of the employer and the unseaworthiness of the vessel because of the unsafe condition caused by the protruding wires; and (b) that petitioner failed in its duty to provide proper medical care under the circumstances.

The District Court dismissed the libel, holding that, while the protruding wires constituted a dangerous condition, it was transitory in nature and for which the shipowner could not be held responsble. That Court also held that the Captain and the Mate had done all that was possible for Holliday and that, therefore, petitioner had not failed in its duty to provide prompt and adequate medical care.

The Court of Appeals considered the case de novo, it being in admiralty, and after a penetrating analysis of the record, held that the testimony of the Captain and the Mate was not worthy of belief and reversed the decision of the District Judge upon the testimony of impartial witnesses and documentary reports and log books.

Thereafter, petitioner moved for a rehearing in the Court of Appeals, and annexed an ex parte affidavit of the Captain to the petition, in which petitioner attempted to excuse its delay of seventeen hours before obtaining medical aid after arrival in Capetown. In explanation of that delay,

Captain Butler deposed that upon arrival in Capetown he was prevented from entering the harbor by the naval authorities because of wartime conditions and for that reason was unable to obtain medical aid or to take Holliday ashore for medical attention (R. 170-172). In opposition to the petition for rehearing, respondent obtained the affidavits of the naval authorities in Capetown, including the Director of the South African Naval Forces stationed in Capetown, the Port Captain at Capetown harbor, and the officer in charge of the Signal and Radio Station in Capetown at the time of the incident involved herein. The affidavits of these officials squarely repudiated the affidavit of Captain Butler. They disclosed that on the very night that the "Peter Kerr" arrived, another vessel arrived shortly thereafter and entered the harbor without incident (R. 181); that if the master of the "Peter Kerr" had desired medical aid for a member of the crew, he had the following alternatives open to him: (1) he could have taken the vessel into the harbor, (2) he could have used a launch to bring Holliday into the harbor, or (3) he could have had a doctor brought aboard from the harbor (R. 181-182).

The Court of Appeals denied the petition for a rehearing.

In this proceeding petitioner seeks to have this Court review the fact findings of the Court of Appeals.

ARGUMENT.

While petitioner contends that there is no evidence in the record to support the findings of the Court of Appeals, it is clear that petitioner's complaint goes to the credibility of the witnesses rather than to the lack of evidence.

The Record Clearly Sustains the Findings of the Court of Appeals.

The nub of the controversy centers around two controversial witnesses, the Captain and the Mate of the vessel. Their testimony was accepted by the District Judge in exonerating the vessel from liability. The Court of Appeals rejected that testimony in reversing the District Court and premised its decision upon documentary evidence and the testimony of impartial witnesses. The petitioner assails that decision on the ground that the Court of Appeals should not have substituted its judgment for that of the District Judge in testing the credibility of the Captain and the Mate.

It is a settled rule that an appeal in admiralty partakes of a trial de novo and serves to vacate the decree of the District Court. *Crist v. U. S.*, 163 F. 2d 145, cert. den. 332 U. S. 852. The findings of the trial judge, when supported by competent evidence, are entitled to great weight and such findings will not normally be set aside by the Court of Appeals except upon a showing that they are clearly erroneous. *The S. C. L. No. 9*, 114 F. 2d 964. The basis for the latter rule is "that the trial judge has a peculiar opportunity for appraising the worth of oral testimony by observing the witness' demeanor which the cold print of a record fails to disclose". *The S. C. L. No. 9, supra.* That rule is modified where the findings of the District Court are based on depositions. *Matson Navigation Company v. Pope and Talbot, Inc.*, 149 F. 2d 295; *Crist v. U. S., supra.* In the latter case the Court of Appeals reversed the District Court, where part of the testimony was rendered orally in open court and part was taken by deposition.

In the instant case, the testimony of the Captain and the Mate was taken by deposition. A brief review, touching upon the highlights of the testimony of these two witnesses, will demonstrate why the Court of Appeals found that neither of these two witnesses testified truthfully.

Both the Captain and the Mate testified that Holliday had never sustained any accident and that his trouble stemmed from numerous sores on both legs which pre-dated his service on the vessel. This testimony was squarely contradicted by the examining doctor in Capetown, who testified that there were no sores on Holliday's legs other than the infection on the left ankle where the wires penetrated the leg when he examined him at the time of his removal from the vessel (R. 116).

Captain Butler testified that Holliday had come to him long before the accident, complaining of trouble with his legs; that he examined him at that time and found open sores over both legs. He further testified that about three months later, shortly before the vessel arrived in Capetown, he made another examination and Holliday's condition "was pretty much the same general condition that there was at the commencement of the voyage" (R. 83). When pressed regarding the swelling of the leg, he said that there was "not any particular swelling" (R. 83).

As has already been pointed out, the Captain's testimony in attempting to attribute the illness to "sores on both legs" was discredited by the testimony of the examining doctor in Capetown. The Captain's testimony regarding the swelling is squarely refuted by the ship's own papers. The record discloses that the Captain kept two sets of records—one, the record required by law, and another, a private record for the use only of the petitioner. The Federal statutes require (46 U. S. C. A. 201 et seq.) that every vessel shall have an official log book, and the master is required to record therein "every case of illness or injury happening to any member of the crew, with the nature

thereof and the medical treatment". This log book must be deposited with the Shipping Commissioner at the end of the voyage and it then becomes public property.

In the instant case the Captain made an entry in the official log book which was completely contrary to the facts as he knew them at that time. Under date of February 8, the day that Holliday was removed to the hospital, the Captain made this entry in the official log:

> "Feb. 8, 1942
>
> Capetown, S. A. Clinton L. Halliday, Ch. Cook, this day hospitalized on recommendation of Doctor H. L. Shapiro. Halliday's lower legs and feet were badly swollen with eruptions and blisters. Illness was not diagnosed.
>
> (Signed) WILLIAM H. BUTLER,
> Master."

Compare that entry with the one which was entered in the private scrap log made on the same date:

> "2/8
>
> C. Holliday, Cook, pain in left leg. Soap liniment. *Leg was swollen to twice its normal size.* Soaked in epsom salts solution. *Diagnosed* by Dr. Shapiro *as blood poison.* Sent to hospital in Capetown where he died. Illness report made."

Note first of all that this latter entry in the private log refers to one leg and not both legs, as does the official log; note that the private log specifically identifies the condition as being "swollen to twice its normal size", as against the sworn testimony of the Captain that there was "not any particular swelling"; note that the private entry shows the condition was diagnosed as "blood poisoning", while in the official log the Captain stated that the "illness was not diagnosed". Both of these entries were made on the same day, so that there could be no question about faulty recollection, nor could there be any room for misundertaking.

The testimony of the Mate is of like character. In his deposition he testified that for the three months period prior to the accident he had been treating the decedent for "open sores" on his legs. Yet, there is not a single entry either in the official or private log to support any suggestion that the decedent had either complained of or had been treated for any such condition. The Mate testified that when he first noticed the sores, he figured something was wrong with Holliday's blood (R. 137), the clear implication being that Holliday was afflicted with a venereal disease. On cross-examination he was reminded that if he had had any suspicion that Holliday was afflicted with a venereal disease, he would have been required to remove him from duty at once, particularly since Holliday was the ship's cook. Realizing the blunder which he had made, the Mate then changed his testimony and stated that he thought Holliday was suffering from diabetes (R. 153). He was then unable to explain why he failed to obtain medical aid at any time during the three month period for treatment of such a serious ailment, nor was he able to offer any explanation for the absence of entries in the log books.

It is small wonder that the Court of Appeals rejected the testimony of the Captain and the Mate as being unworthy of belief. That Court accepted the testimony of Dr. Shapiro, the examining doctor in Capetown, which testimony clearly reveals the negligence of this respondent in failing to obtain proper and prompt medical attention for the decedent.

When Dr. Shapiro was first called aboard the vessel, he examined Holliday and found "an intensely swollen leg with underlying celluitis and large blisters. Holiday was then irrational and delirious and also suffering from septicemia" (R. 114). In the hospital Holliday was treated with sulphonamide products, but his condition was so bad that he went steadily downhill, and he died ten days after admission (R. 114).

The original injury which Holiday suffered in the refrigerator was a relatively minor one which could have been overcome very easily, but as time passed without adequate treatment, the wound became infected and the timing of medical treatment became a highly important factor in checking the progress of the infection. In this connection, Dr. Shapiro pointed out (R. 115):

> "It would appear that the original injury was a minor one for such cleansing might and would have been treatment, but when the leg began to swell and the ankle became 'sore and pussy' and 'the skin rose up like a water blister around the ankle' *while the ship was in Port Elizabeth, he should have been taken ashore for treatment in Hospital.*"

On cross-examination, petitioner sought to shake the testimony of Dr. Shapiro by suggesting that a Dr. Bester may have examined Holilday while the vessel was in Port Elizabeth and advised that it was not necessary to remove Holliday from the vessel. In response to that question, Dr. Shapiro answered (R. 121):

> ". . . I find it very difficult to believe that a doctor of Doctor Bester's standing would have permitted the patient to sail in the ship with his leg in the condition stated in the interrogatory. I have no knowledge of the treatment which was prescribed by Dr. Bester."

Significantly, petitioner failed to take the testimony of Dr. Bester, although it was readily available. The trial of this case took place in November, 1947. Dr. Bester died three years later, in 1950. No attempt was made to take his testimony before the trial or at any time during the three-year period after the trial until his death. The inescapable inference is that Dr. Bester either never examined Holliday when the vessel was in Port Elizabeth, or if he did, his testimony would have been the same as that of Dr. Shapiro.

The record is replete with evidence which suports the findings of the Court of Appeals that petitioner failed in its duty to provide proper and prompt medical care and attention, resulting in the decedent's death. The Captain's indifference to Holliday's condition and his need for medical treatment is matched only by his reckless disregard for the truth. On the basis of this record, the Court of Appeals reached the inescapable conclusion that petitioner was grossly negligent in failing to observe the most elemental principles of due care under the circumstances.

The Ex Parte Affidavits.

Petitioner's contention with respect to the ex parte affidavits is indeed most extraordinary and amazing. It is contended that the ex parte affidavits offered by the respondent improperly influenced the Court of Appeals and they should not have been received because such affidavits are not evidence and not admissible into the record (petitioner's Pet. for Cert. pp. 6-7).

The fact of the matter is that the decision of the Court of Appeals was rendered on the basis of the record made in the District Court and its opinion was filed before any ex parte affidavits were presented. After the Court of Appeals had rendered its decision, this petitioner filed a petition for rehearing *and along with that petition submitted an ex parte affidavit of the same Captain Butler whose testimony had already been repudiated by the Court.* In that affidavit Captain Butler deposed that at the time the vessel arrived in Capetown, the British naval authorities would not permit it to enter the port until the following day and that he was prevented from obtaining medical attention or sending Holliday ashore for treatment (R. 172). It was urged by the petitioner, on the basis of that affidavit, that Captain Butler could not be held liable for the delay of seventeen hours in obtaining medical attention at Capetown.

In reply to the petition for rehearing, respondent pointed out that the affidavit of Captain Butler was dehors the record and could not properly be considered in the disposition of the case. However, in order to protect against the possibility that the Court might be misled by the "facts" in Captain Butler's affidavit, respondent obtained the affidavits of naval officials in charge of the port of Capetown at the time of the incident involved herein and attached them to the answer to the petition for rehearing. Those affidavits were made by the Director of the South African Naval Forces stationed in Capetown, the Port Captain at Capetown harbor, and the officer in charge of the Signal and Radio Station in Capetown. The sworn statements of those officials are in direct irreconcilable conflict with the affidavit of Captain Butler. The official log of Capetown harbor, an excerpt of which is annexed to the affidavits, discloses first of all that on the very night the "Peter Kerr" arrived, another vessel arrived shortly thereafter and proceeded into the harbor without difficulty (R. 181). The South African officials further deposed, inter alia (R. 181, 182):

> "5. Had the Master of the S. S. Peter Kerr wished to obtain urgent medical aid for a member of his crew, the following courses were open to him
>
> (a) He could have reported to the Boarding Officer at the arrival line. He in turn would have reported to the Chief Examining Officer who was in wireless contact with my station and with the Port Captain's Office.
>
> (b) After anchoring he could have contacted my signal station by lamp or flag requesting medical aid. (It was not dark until approximately 2015 on 7th February 1942.)
>
> "I am not able to state whether any such request was made, as signals of that nature were not logged.

If such a request was made the authorities would have acted as follows:

Either (a) Given permission to dock the vessel

or (b) Used the naval launch to bring the man into the harbour,

or (c) Sent a doctor from the shore to the vessel in the roadstead,

or (d) Sent a port craft (as opposed to the naval launch) to bring the patient ashore.

"I know of my own knowledge that these courses were open and available at that time because I frequently handled messages from incoming vessels requesting medical aid; and I know that assistance was given in the manner indicated."

It was thus demonstrated that the "facts" newly alleged by Captain Butler were not facts at all but merely irresponsible statements from a witness whose testimony had already been discredited. Aside of the merits of the controversy, it is most surprising that petitioner should now complain about the filing of ex parte affidavits in view of the fact that it was the petitioner which introduced the ex parte affidavits in the first instance and respondent's affidavits were solely and exclusively in rebuttal to petitioner's affidavit. To now make it appear that respondent initiated the practice of filing the ex parte affidavit and that the Court of Appeals below was influenced in its decision by that document exceeds the bounds of legitimate argument.

There Is No Important Question of Law Involved.

The issues raised in the petition for certiorari do not involve the interpretation of any rule of law or statute. The petition simply seeks to have this Court review the evi-

dence in the hope that this Court may accept the testimony of the Captain and the Mate as against that of the impartial witnesses and documentary evidence in this case. This Court has steadfastly declined to grant review in such cases. In this case there is every reason to deny the petition in view of the particular circumstances involved.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ABRAHAM E. FREEDMAN,
HENRY A. WISE, JR.,
Counsel for Respondent.